

head start in the newly liberalized market for digital mobile telephony, but a Rome court rejected the complaint.⁴⁹⁵

The Italian government, however, has granted Omnitel certain privileges to ensure that Omnitel will be able to compete effectively against TIM. Omnitel will be allowed to offer service to its subscribers using TIM's base station infrastructure, and Omnitel will have equal access to Telecom Italia's public network.⁴⁹⁶ But Omnitel has not yet received permission to construct its own infrastructure between base stations.⁴⁹⁷

Olivetti holds the largest share of Omnitel, but foreign investors own a significant majority of the consortium. Olivetti owns 35.7 percent.⁴⁹⁸ Bell Atlantic owns 11.6 percent.⁴⁹⁹ AirTouch owns 10.2 percent.⁵⁰⁰ Cellular Communications International, Inc. (also an American telecommunications company) owns 10.3 percent.⁵⁰¹ Telia Mobitel AB owns 6.8 percent. Lehman Brothers owns 5.6 percent. Mannesmann AG owns 4.5 percent.⁵⁰² Banca di Roma owns 4.5 percent.⁵⁰³ Other minority investors hold the remaining interest.⁵⁰⁴ AirTouch is the lead technical partner and has appointed Omnitel's director of engineering.⁵⁰⁵

495. Andrew Hill, *Italy clears line for digital phones*, FIN. TIMES, Mar. 31, 1995, at 3.

496. MERRILL LYNCH TIM REPORT, *supra* note 449, at 2.

497. CRANSTON, *supra* note 303, at 131.

498. AIRTOUCH COMMUNICATIONS, INC., 1993 SEC FORM 10-K, at 16 (1994).

499. BELL ATLANTIC CORP., 1994 SEC FORM 10-K, at 19 (1995).

500. AIRTOUCH COMMUNICATIONS, INC., 1994 ANNUAL REPORT 62 (1995).

501. AIRTOUCH COMMUNICATIONS, INC., 1994 SEC FORM 10-K, at 18 (1995).

502. AIRTOUCH COMMUNICATIONS, INC., 1993 SEC FORM 10-K, at 16 (1994).

503. CRANSTON, *supra* note 303, at 131.

504. *Id.*

505. AIRTOUCH COMMUNICATIONS, INC., 1993 SEC FORM 10-K, at 16 (1994).

Another major American company plans to participate in the Italian wireless market but without taking an equity interest in an operator. IBM has joined with Telecom Italia to provide mobile office service to Italian customers.⁵⁰⁶ IBM is linking high-speed networks around the world to offer businesses a range of computer services that could be customized for individual multinationals.⁵⁰⁷

Cable & Wireless applied in 1995 to become Italy's third wireless telephony provider. Cable & Wireless seeks to operate a personal communications network.⁵⁰⁸ No such networks currently exist in Italy.

Spain

For years, Spain's telecommunications industry was characterized by the stereotypical state-owned monopoly—an insular enterprise that had achieved only limited infrastructure buildout and substandard service. By 1995, however, this monopoly had started to change as competition began to emerge in certain markets, such as data transmission and cellular telephony. Full competition in all markets is due in 1998. And as the government moves toward selling off its remaining interest in the state-owned telecommunications operator, it is torn between the need to show the world that it is willing to free the telecommunications sector from its state-owned heritage and the desire to control the development of this dynamic industry. The Spanish government, with its announcement that it will liberalize its telecommunications industry by 1998 along with most of its European partners (despite receiving a five-year extension), holds its telecommunications sector up as an

506. Andrew Hill, *IBM, Telecom Italia in mobile office deal*, FIN. TIMES, Apr. 8, 1995, at 11.

507. Andrew Hill, *Italy's state telecom company and IBM discuss network link*, FIN. TIMES, Feb. 9, 1995, at 1.

508. *Cable and Wireless seeks Italian licence*, FIN. TIMES, June 7, 1995, at 7.

example that Spain has embraced free markets and private enterprise and is poised to participate as a significant member of the European Union. Yet, as Spain progresses toward liberalization, its government shows its difficulty in completely severing its strong ties to the telecommunications industry.

The limited growth and development of the telecommunications infrastructure and services under the monopoly regime have yielded prime conditions for significant growth, and this opportunity has, in turn, lured foreign investors to a market that remains, for the time being, relatively closed to non-EU interests. Spain has a population of approximately 39 million people.⁵⁰⁹ As of June 1995, Spain had a telephone penetration rate of 37.8 lines per 100 inhabitants.⁵¹⁰ The penetration rate is below the EU average and substantially below that in the U.S. and Canada.⁵¹¹ Industry analysts expect Spain's telecommunications industry to generate 6.7 percent of Spain's GDP by 2005.⁵¹² Recognizing the opportunity in Spain's telecommunications industry, the U.S. has entreated the Spanish government to open its nation's telecommunications industry to foreign investors.⁵¹³ In particular, the U.S. would like greater access to Spain's nascent cable television industry.⁵¹⁴

Finally, as Spain endures the outside pressures from the EU and other countries such as the U.S., its own monopoly incumbent, Telefónica de España, has looked to foreign markets to grow while fending off domestic competition. Telefónica has pursued an aggressive acquisition strategy in

509. ITU WORLD DEVELOPMENT REPORT, *supra* note 6, at A-3.

510. MERRILL LYNCH, TELECOMMUNICATIONS SERVICES: GLOBAL VALUATION AND STATISTICAL REVIEW 14 (June 21, 1995) [hereinafter MERRILL LYNCH GLOBAL VALUATION].

511. TELEFÓNICA DE ESPAÑA, S.A., 1993 SEC FORM 20-F, at 3 (1994).

512. Tracey Ober, *Spanish telecoms stirring interest as market opens*, REUTER EUR. BUS. REP., Feb. 20, 1995.

513. *U.S. pushes Spain on investment*, STAR TRIB., Feb. 28, 1995, at 3D.

514. *Id.*

Latin America, benefitting from financial strength, technical expertise, and a strong understanding of the local culture.

History. In 1924, the International Telephone and Telegraph Corporation (ITT) formed Telefónica de España to purchase and consolidate all the operations of existing phone companies in Spain.⁵¹⁵ In 1945, the Spanish government purchased all Telefónica shares then owned by ITT.⁵¹⁶ By 1946, Telefónica entered into its first contract with the government for the provision of basic telephony.⁵¹⁷ Since then, Telefónica has continued to operate under a contract with the state. Its current contract, executed in 1987, runs for thirty years and establishes Telefónica as the nation's sole provider of basic telecommunications services and infrastructure.⁵¹⁸ The terms of the contract will be amended to conform to the EC telecommunications liberalization directive so that Spain will allow competition throughout its telecommunications industry by January 1, 1998.⁵¹⁹

Regulation. Law 31/1987, enacted in December 1987 (the Telecommunications Law) governs the telecommunications industry in Spain.⁵²⁰ The Transport and Communications Ministry enforces the Telecommunications Law and enacts regulations thereunder.⁵²¹

Telefónica de España has a statutory monopoly on the provision of basic voice communications services and on the ownership, maintenance, and operation of telecommunications infrastructure.⁵²² Under the Telecommunications Law, the

515. TELEFÓNICA DE ESPAÑA, S.A., 1993 SEC FORM 20-F, at 1 (1994).

516. *Id.*

517. *Id.*

518. CRANSTON, *supra* note 303, at 139.

519. TELEFÓNICA DE ESPAÑA, S.A., 1993 SEC FORM 20-F, at 9 (1994).

520. *Id.*

521. *Id.*

522. CRANSTON, *supra* note 303, at 139.

market for the delivery of value-added services, such as electronic-mail and radio paging, was opened to competition in 1987.⁵²³ In 1989, the government liberalized the retail market for customer premises equipment.⁵²⁴ And in 1993, the government liberalized the market for satellite services and data transmission.⁵²⁵

Under the 1992 Telecommunications Amendment, which modified the Telecommunications Law, Spain's data transmission services market was opened to competition on January 1, 1993; there is now no limit on the number of concessions that the government may issue.⁵²⁶ The Transport and Communications Ministry issued licenses to operate nationwide data networks to four groups: BT Telecomunicaciones, Cable & Wireless, France Telecom, and Unisource.⁵²⁷ Telecom Italia and IGR also hold licenses to operate data networks in Spain.⁵²⁸

BT entered Spain's data transmission market by purchasing part of an existing enterprise. In 1993, BT acquired a 50 percent interest in a data transmission company owned by Banco Santander.⁵²⁹ Through this joint venture, renamed BT Telecomunicaciones, the two companies plan to exploit the bank's nationwide data network.⁵³⁰ The joint venture commenced commercial operation in April 1994.⁵³¹ BT's total investment through 2005 will be £400 million.⁵³²

523. TELEFÓNICA DE ESPAÑA, 1993 SEC FORM 20-F, at 9 (1994).

524. Ober, *supra* note 512.

525. *Id.*

526. TELEFÓNICA DE ESPAÑA, S.A., 1993 SEC FORM 20-F, at 4 (1994).

527. CRANSTON, *supra* note 303, at 140.

528. *Id.*

529. Alan Cane, *A serious switch to the Continent: Alan Cane examines BT's multi-billion dollar link-up with telecoms operators prior to liberalisation*, FIN. TIMES, May 22, 1995, at 17.

530. CRANSTON, *supra* note 303, at 145.

531. *Id.*

532. Cane, *A serious switch to the Continent: Alan Cane examines BT's multi-billion dollar link-up with telecoms operators prior to liberalisation*,

The EU has given Spain until 2003 to liberalize its markets for telecommunications infrastructure and basic voice telephony services; but in October 1994, the Spanish government declared that it would open to competition all sectors of Spain's telecommunications industry in 1998, at the same time as most other EU member states.⁵³³ Like most other European countries that have promised to comply with the EC directive for full telecommunications liberalization by 1998, however, Spain has not yet outlined the contours of this future regulatory environment. Some industry officials expect the Spanish government to license just one additional operator in 1998.⁵³⁴

Furthermore, Spain has made no indication that it will open its telecommunications any more to non-EU entities. Currently, under the Telecommunications Law, foreign ownership in a telecommunications licensee may not exceed 25 percent unless the Council of Ministers approves a waiver.⁵³⁵

Telefónica. For decades, Telefónica de España was the state-owned monopoly provider of all the nation's telecommunications services.⁵³⁶ Despite the introduction of competition to certain telecommunications markets over the past few years, Telefónica remains the nation's telecommunications monolith, still partially owned by the government and retaining a monopoly over telecommunications infrastructure and basic voice telephony.

Recently, Telefónica has taken significant measures to prepare for competition. In 1994, the telecommunications operator reorganized into eight specialized operating companies.⁵³⁷ Telefónica improved its networks, and, in 1995, 44

supra note 529, at 17.

533. Tom Burns, *Survey of Spain*, FIN. TIMES, June 30, 1995, at 31.

534. Ober, *supra* note 512.

535. TELEFÓNICA DE ESPAÑA, 1993 SEC FORM 20-F, at 9 (1994).

536. CRANSTON, *supra* note 303, at 139.

537. Tom Burns, *Argentaria has option on Telefonica*, FIN. TIMES, Jan. 31, 1995, at 26; Alan Cane, *The FT500*, FIN. TIMES, Jan. 20, 1995, at XVI..

percent of its network was digital.⁵³⁸ Finally, Telefónica's earnings recently have been particularly high. In the first quarter of 1995, Telefónica enjoyed a 40 percent increase in before-tax earnings.⁵³⁹

Telefónica is one of Spain largest companies. By measure of stock market capitalization, Telefónica is the largest company in Spain;⁵⁴⁰ Telefónica's market value is over \$11 billion.⁵⁴¹ The Spanish government owns 32 percent of Telefónica,⁵⁴² and private investors own the remaining 68 percent;⁵⁴³ shares are quoted on several foreign stock exchanges, including ADRs on the New York Stock Exchange.⁵⁴⁴ As the Spanish government privatizes many of its state-owned companies in the face of pressure from the EU, the government has shown reluctance to relinquish control over what will be one of the nation's most important industries.

Privatization. The economic targets set as a condition for Spain's membership in the EU have placed significant pressure on that country to privatize many state-owned institutions—not only in furtherance of the belief that the private enterprise will be more efficient and less burdensome than the government, but also for the simple reason of generating revenue. Spain's unemployment is still the EU's highest at 23.9 percent at the end of 1994.⁵⁴⁵ Interest rates as of March

538. MERRILL LYNCH GLOBAL VALUATION, *supra* note 510, at 10.

539. David White, *Telefonica profit advances 15%*, FIN. TIMES, May 17, 1995, at 26.

540. *Id.*

541. Tom Burns, *Spain prepares for Telefonica sale*, FIN. TIMES, Apr. 29, 1995, at 9.

542. Antonia Sharpe, *Repsol deal augurs well for Portugal Telecom—Global share offers*, FIN. TIMES, Apr. 18, 1995, at 28.

543. CRANSTON, *supra* note 303, at 141.

544. TELEFÓNICA DE ESPAÑA, S.A., 1993 SEC FORM 20-F, at 1 (1994).

545. David White, *Survey of Spain—Banking and Finance*, FIN. TIMES, May 23, 1995, at I.

1995 were around 8.5 percent.⁵⁴⁶ And the government's budget deficit still looms large. Recognizing the need to reduce the deficit and the difficulty of generating greater revenue for the government, the Spanish government hopes to shrink the deficit to \$8.9 billion without increasing taxes or diminishing social benefits.⁵⁴⁷

Under the convergence criteria set forth in the Maastricht Treaty, the public sector deficit must be cut from 6.7 percent of GDP in 1994 to 5.9 percent in 1995, 4.4 percent in 1996, and 3 percent in 1997.⁵⁴⁸ Also, as a condition for permitting the Spanish Peseta's membership in the EU's exchange rate mechanism, the EU indicated that privatization of public enterprises was a "high priority."⁵⁴⁹

In 1994, the Economy and Finance Ministry proposed to reduce the government's 32 percent equity interest in Telefónica to a mere token presence by 1998. The Transport and Communications Ministry opposed the plan, citing a perceived need to maintain government control over the telecommunications operator. Under the Economy and Finance Ministry's initial proposal, the government would have: (1) sold 15 percent of the company by as early as June 1995; (2) sold another 10 percent in 1996; and (3) reduced its ownership to a small percentage of the company by January 1, 1998.⁵⁵⁰ A large but unspecified portion of the initial 15 percent bloc would have been sold to three core investors: Banco Bilbao Vizcaya (BBV), a large retail bank; La Caixa, the largest domestic savings bank; and Argentaria, a banking

546. *Id.*

547. *Id.*

548. *Id.*

549. Sharpe, *supra* note 542, at 28.

550. Tom Burns, *Telefonica sale hits snag*, FIN. TIMES, Apr. 24, 1995, at 22.

corporation.⁵⁵¹ The Spanish government owns 52 percent of Argentaria.⁵⁵²

The Transport and Communications Ministry argued that the state should maintain its control over Telefónica by retaining a minimum stake of 20 percent.⁵⁵³ The Economy and Finance Ministry, however, has greater say in the matter because the government holds its Telefónica interest through Patrimonio del Estado, the Economy and Finance Ministry's portfolio company.⁵⁵⁴

The government resolved the dispute in April 1995. It announced that it will sell 12 percent of its equity in Telefónica by the end of 1995.⁵⁵⁵ The offering is scheduled for the first week in October.⁵⁵⁶ The government expects to raise \$1.4 billion through the sale.⁵⁵⁷ The government has also indicated that it will reduce its equity in Telefónica to a token level within three years.⁵⁵⁸ Argentaria, the state-controlled banking institution, BBV, and La Caixa jointly hold a 7.5 percent interest in Telefónica.⁵⁵⁹ These three institutions have agreed to increase their stake in the company to 15 percent.⁵⁶⁰

In addition to the indirect interest in Telefónica held by the government through Argentaria, the Spanish government will retain a further degree of control by means of recently

551. Tom Burns, *Spain poised to sell half its 32% Telefonica stake*, FIN. TIMES, Apr. 20, 1995, at 31.

552. Sharpe, *supra* note 542, at 28.

553. Burns, *Spain poised to sell half its 32% Telefonica stake*, *supra* note 551, at 31.

554. Burns, *Telefonica sale hits snag*, *supra* note 550, at 22.

555. Carita Vitzthum, *Spain Approves Sale of 12% Stake in Telefonica*, WALL ST. J., May 1, 1995, at A9H.

556. *Telefonica selects banks for global share offering*, FIN. TIMES, June 22, 1995, at 31.

557. Burns, *Spain prepares for Telefonica sale*, *supra* note 541, at 9.

558. Tom Burns, *Salomon wins role in Telefonica sell-off*, FIN. TIMES, June 1, 1995, at 25.

559. Richard Lapper, *Spanish banks may win exclusive role in Telefonica deal*, FIN. TIMES, May 2, 1995, at 28.

560. *Id.*

enacted legislation designed to regulate future offering of shares in state-owned companies.⁵⁶¹ In addition to reserving for the government the power to decree what a privatized company can do, the law will give the government the power to veto any attempts at a takeover.⁵⁶²

As with all Spanish telecommunications operators, under the Telecommunications Law, foreign direct investment in Telefónica is limited to 25 percent unless otherwise authorized by the Council of Ministers.⁵⁶³

The Spanish government has chosen the banks that will handle the offering. Salomon Brothers will act as the Spanish government's financial adviser.⁵⁶⁴ Merrill Lynch, BBV, Argentaria, and La Caixa will coordinate the global offering.⁵⁶⁵

Cable Television. Cable television in Spain is undeveloped. But potential investors have already positioned themselves to enter the Spanish cable market, believing that vast opportunities exist there. Spain currently has no legislation authorizing or regulating cable television. About thirty small operators provide cable service in major cities such as Barcelona, Seville, and Madrid.⁵⁶⁶ They pass about 120,000 homes. Another 200,000 homes are connected to community video systems such as SMATV.⁵⁶⁷ Industry analysts estimate that as many as four million of the country's 11.8 million television

561. Tom Burns, *Assets sale—starting soon: The government's privatisation in Spain*, FIN. TIMES, Mar. 28, 1995, at 20.

562. *Id.*

563. TELEFÓNICA DE ESPAÑA, S.A., 1993 SEC FORM 20-F, at 9 (1994).

564. Burns, *Salomon wins role in Telefonica sell-off*, *supra* note 558, at 25.

565. *Telefonica selects banks for global share offering*, *supra* note 556, at 31.

566. *Investors say Spanish cable bill is too restrictive*, NEW MEDIA MARKETS, Jan. 13, 1994.

567. *Id.*

households may be connected to cable television systems by 2002.⁵⁶⁸

Although it appears likely that cable operators will not be permitted to provide telephony services before 1998, investors are attracted to the Spanish cable market because of its apparently high demand for video services, its lack of entrenched competition with a large installed customer base, and a particularly high density of urban homes that will enable cable operators to keep infrastructure costs low. Spanish cities average 800 homes per square mile, whereas British cities, for example, have only 180 homes per square mile.⁵⁶⁹

As of 1995, Spain was one of the few western European countries still without cable television legislation.⁵⁷⁰ The Spanish government passed a satellite television bill in 1992, and Spain's direct-to-home (DTH) satellite market has developed well since;⁵⁷¹ but the government declined to enact cable television legislation when it passed the satellite television law. In late 1994, however, the Spanish cabinet approved draft cable television legislation, but the bill has languished in the parliament ever since.⁵⁷²

Under the draft legislation, the government would award only one concession for all population centers of more than 20,000 people.⁵⁷³ Only companies registered in Spain would be able to bid for franchises.⁵⁷⁴ Foreign investors would be limited to a 25 percent equity interest in an operator;⁵⁷⁵

568. Elena Bowes, *Investment flowing to cable TV in Europe*, ADVERTISING AGE, Mar. 20, 1995, at I20.

569. Stewart Wittering, *No more manana; Spain deliberates on cable and local TV telecommunications bills*, COMM. INT'L, Mar. 1995, at 58.

570. *Id.*

571. *Id.*

572. Ober, *supra* note 512.

573. *Spain approves draft local cable television legislation*, EUROMARKETING, Jan. 10, 1995.

574. *Id.*

575. *Country update: Spain: Foreign investors eye cable TV*, BUS. EUR., Apr. 24, 1995.

corporations or individuals from EU member countries would not be considered foreign entities with regard to this limitation.⁵⁷⁶ Whether North American subsidiaries operating in the U.K. would be considered corporations from the EU has yet to be decided.⁵⁷⁷ Much like the waiver provision of the U.S. foreign ownership restrictions in section 310(b)(4) of the Communications Act, the Spanish government reserves the right to authorize up to 100 percent foreign ownership in certain circumstances.⁵⁷⁸

Under the draft legislation, operators that currently provide service without a license would be able to continue to provide cable television service until the government issued a concession for the given area. These unlicensed operators would be allowed to bid for licenses under the new law, but if unsuccessful, they would be obliged to cease operations within five years.⁵⁷⁹

With the lucrative prize of the Spanish cable television market set firmly in their sights, several diverse companies—with and without telecommunications experience, domestic and foreign—have begun jockeying in what may prove to be a highly competitive contest. Some are waiting for the legislative uncertainty to subside; others are rushing in.

Telefónica will probably be the largest cable television operator in Spain.⁵⁸⁰ General Secretary for Communications Elena Salgado has indicated that Telefónica will be allowed to provide cable television service over its own network,⁵⁸¹ and the company has already taken major steps to become a successful cable operator. Telefónica has launched its “Plan Foton,” a project to build fiber-optic networks in all major

576. Wittering, *supra* note 569, at 58.

577. *Id.*

578. *Id.*

579. *Investors say Spanish cable bill is too restrictive*, *supra* note 566.

580. CRANSTON, *supra* note 303, at 145.

581. *Telefonica to be allowed to operate in Spain cable TV*, AFX NEWS, July 24, 1995.

metropolitan areas, including Madrid, Barcelona, Seville, Bilbao, and Valencia.⁵⁸² And over the objection of several potential entrants, Telefónica Multimedia, a subsidiary of Telefónica de España, has begun a free trial of cable television services in thirty-eight Spanish cities with the goal of having 150,000 participants by the end of 1995.⁵⁸³ Despite the fact that it does not already operate a cable network in Spain, Telefónica will be experienced with regard to the provision of cable television services, for the company already operates cable television networks through its international holdings in Chile and Peru.⁵⁸⁴

Telefónica is in search of a partner to help bear the heavy financial burden of building nationwide broadband cable networks. Telefónica would like to sell 49 percent of Telefónica Multimedia.⁵⁸⁵ Telefónica is reportedly courting an American partner; Capital Cities/ABC and Discovery Communications have both had discussions with Telefónica about the possible investment.⁵⁸⁶

Potential competitors have already lined up to challenge Telefónica's foray into the nascent cable market. Because of the significant political, financial, and technical requirements, most interested companies have entered joint ventures, pairing the technical expertise and market experience of foreign telecommunications firms with the financial and political might of certain domestic institutions. One potential entrant that will likely prove to be a formidable competitor is Cable y Television d'Europa S.A. In 1994, Time Warner and U S West joined with Multimedia Cable of Barce-

582. CRANSTON, *supra* note 303, at 145.

583. Elena Ruiz Arguello, *Spain's Telefonica raises ire with free cable test*; *Compania Telefonica Nacional de Espana S.A.*, MULTICHANNEL NEWS, May 29, 1995, at 32.

584. Burns, *Survey of Spain*, *supra* note 533, at 31.

585. *Id.*

586. *Id.*

lona to form Cable y Television d'Europa.⁵⁸⁷ The venture awaits the final resolution of the pending legislation before implementing its as-yet undisclosed plans.⁵⁸⁸

Another entrant, Zaragoza de Cable, has chosen to forge ahead without final word on the imminent cable regulation. The company is constructing a cable network in the Zaragoza region. Zaragoza de Cable is a joint venture between Jones Intercable, Bell Cablemedia, Banco de Santander, Ibercaja (a savings bank), TUCSA (a public transportation agency), El Corte Ingles (a department store), Heraldo de Aragon (a newspaper), and Multitel.⁵⁸⁹

Yet another participant in the Spanish cable television market will be Santander de Cable, a joint venture of Multitel SA of Andalucia, Banco Santander, United International Holdings (as the technical partner), Electra de Viesgo (a regional electricity company), Caja Cantabria (a savings bank), the Santander municipal government, and the regional press.⁵⁹⁰

Wireless. Until the government licensed a second cellular operator in 1994, Telefónica de España had a statutory monopoly on cellular telephony. As of August 1995, Telefónica remains the only cellular provider in Spain, until the entrant's network becomes operational. Telefónica operates two analog cellular networks and a digital GSM network.⁵⁹¹ As of March 1995, Telefónica had slightly more than 411,000 cellular subscribers.⁵⁹² This amounts to a penetration rate of only 1.3 percent,⁵⁹³ far below the EU average of 3.5 percent.⁵⁹⁴

587. Ober, *supra* note 512.

588. CRANSTON, *supra* note 303, at 145.

589. *Id.*

590. Wittering, *supra* note 569, at 58.

591. CRANSTON, *supra* note 303, at 141.

592. MERRILL LYNCH, TELEFÓNICA DE ESPAÑA: OVERSEAS VALUE LAGGING PROFITS 2 (Mar. 15, 1995) [hereinafter MERRILL LYNCH TELEFÓNICA REPORT].

593. MERRILL LYNCH GLOBAL VALUATION, *supra* note 510, at 28.

594. MERRILL LYNCH TELEFÓNICA REPORT, *supra* note 592, at 2.

Despite Telefónica's limited market penetration, industry participants estimate that the market for cellular services will reach 3.3 million subscribers by 2000, 3.1 million of whom will be using GSM service; and 5.2 million subscribers by 2005, with 4.4 million using GSM.⁵⁹⁵

In December 1992, the Spanish government passed an amendment to the Telecommunications Law (the 1992 Telecommunications Amendment). Under the 1992 Telecommunications Amendment, cellular telephone services were to be opened to competition as of January 1, 1994. In late December 1994, the Spanish government awarded the country's second nationwide GSM license to the Airtel consortium.⁵⁹⁶ Airtel expects to begin service in most major Spanish cities, including Madrid, Barcelona, and Seville, by the end of 1995.⁵⁹⁷

Airtel bid approximately \$650 million for the license and plans to invest a total of \$2.27 billion by 2005 to develop the GSM network.⁵⁹⁸ Under the terms of its license, Airtel must provide its GSM service to all towns of more than 10,000 inhabitants within five years.⁵⁹⁹ Airtel expects that its network will reach 95 percent of the Spanish population by 2000 and that, by that same time, the company will have captured 50 percent of Spain's GSM cellular market.⁶⁰⁰ Ana-

595. Carla Vitzthum, *Airtel Consortium Is Planning to Invest \$2.27 Billion in Spain's Cellular Market*, WALL ST. J., at A7A.

596. Tom Burns, *Spanish telecoms licence goes to Airtel*, FIN. TIMES, Dec. 29, 1994.

597. AIRTOUCH COMMUNICATIONS, INC., 1994 ANNUAL REPORT 63 (1995).

598. *Airtel Wins Spain's Cellular Bid*, WALL ST. J., Dec. 29, 1994, at A6.

599. Tom Burns, *Santander snatches cellular phone licence—Banco Bilbao Vizcaya edged out in bid for Spain's mobile telephony system*, FIN. TIMES, Dec. 30, 1994, at 17.

600. Vitzthum, *Airtel Consortium Is Planning to Invest \$2.27 Billion in Spain's Cellular Market*, *supra* note 595, at A7A.

lysts estimate that Spain will have over two million subscribers for mobile telephone service by 1998.⁶⁰¹

The ownership structure of the Airtel consortium matches that of most European licensees with foreign direct investment: A minority investment is made by a few foreign corporations with telecommunications expertise, and a group of wealthy and influential domestic investors who lack telecommunications experience provide the remaining capital. AirTouch, the consortium's lead technical partner, owns 15.8 percent.⁶⁰² BT owns 6.31 percent of the consortium.⁶⁰³ Two Spanish banks—Banco Santander and Banco Central Hispano-americano—each own nearly 13.7 percent.⁶⁰⁴ A group of five Spanish regional savings banks jointly owns 16.8 percent.⁶⁰⁵ The remaining investors are Entrecanales/Cubiernas, 10.4 percent; Fecsa, 7.8 percent; Union Fenosa, 7.8 percent; Torreal, 4.5 percent; and Alba, 2.6 percent.⁶⁰⁶

As the Spanish cellular market moves toward greater competition, the Spanish government has, in two ways, quietly extended its control over this important sector of the telecommunications industry. First, at approximately the same time that the government announced plans to sell off a significant portion of its remaining interest in Telefónica, Argentaria, the state-controlled bank, acquired an option to purchase 10 percent of Telefónica's cellular operations.⁶⁰⁷ Second, the government has gained an indirect but significant equity interest in Airtel. Banco Central Hispano-americano

601. Burns, *Santander snatches cellular phone licence*, *supra* note 599, at 17.

602. AIRTOUCH COMMUNICATIONS, INC., 1994 ANNUAL REPORT 62 (1995).

603. Vitzthum, *Airtel Consortium Is Planning to Invest \$2.27 Billion in Spain's Cellular Market*, *supra* note 595, at A7A.

604. *Id.*

605. *Id.*

606. *Spain's mobile phone competition*, PRIVATISATION INT'L, Dec. 1994.

607. Tom Burns, *Argentaria has option on Telefonica*, FIN. TIMES, Jan. 31, 1995, at 26.

(BCH) recently bought 3 percent of Empresa Nacional de Electricidad SA (Endesa), which is 66 percent state-owned.⁶⁰⁸ BCH, as stated above, holds approximately 13.7 percent of Airtel.⁶⁰⁹ The bank ceded some of its interests in certain industrial companies to Endesa, and the two partners formed a major industrial grouping, leaving them jointly in control of, among other things, 30 percent of Airtel.⁶¹⁰ The arrangement allows the Spanish government to maintain indirect control over the one major area of the Spanish telecommunications industry in which the government has made affirmative steps toward market liberalization. BCH's current management is understood to be well disposed to collaborate with the government's industrial policy.⁶¹¹

The Spanish government chose the Airtel consortium over the higher-bidding Cometa-SRM consortium, stating that Airtel's business plan offered the best combination of economic and commercial benefits, particularly in terms of infrastructure investment and customer pricing packages.⁶¹² Others have suggested that the government allowed political factors, including considerations of foreign ownership, to enter the decision-making process. Newspapers reported that one significant reason that the Cometa-SRM consortium lost out to Airtel was the fact that Vodafone, a foreign entity, had a 23 percent stake in the consortium; foreign ownership in Airtel consortium is not so highly concentrated in any one member.⁶¹³

608. *Spain: Foreign firms have been partially shut out of 3 key industries*, CROSSBORDER MONITOR, July 12, 1995.

609. *Spain's mobile phone competition*, *supra* note 606.

610. *Spain: Foreign firms have been partially shut out of 3 key industries*, *supra* note 608.

611. *Id.*

612. *Airtel's cheap price promise helps to secure Spanish GSM licence*, FINTECH MOBILE COMM., Jan. 12, 1995.

613. Burns, *Santander snatches cellular phone licence*, *supra* note 599, at 17.

Karel Van Miert, EC Competition Commissioner, has challenged Spain's preferential treatment of Telefónica with regard to the issuance of GSM licenses.⁶¹⁴ Airtel paid approximately \$650 million for its license, while Telefónica received its license without charge.⁶¹⁵ In resolving the issue, Airtel seeks greater flexibility in bypassing Telefónica's network. Under the Telecommunications Law, suppliers of value-added services, including cellular operators, may not install their own telecommunications network without a concessionary contract, and that contract will only be granted if Telefónica is not able to provide the necessary network capacity in the given area.⁶¹⁶ But Airtel wants to be allowed to install its own fixed infrastructure throughout the country or to use alternative networks operated by companies other than Telefónica.⁶¹⁷ Airtel also wants more freedom in the provision of international services.⁶¹⁸ Airtel has the right to lease lines from companies other than Telefónica—such as Retevisión and Correos, the state-owned television and postal service providers, respectively.⁶¹⁹ The cellular entrant, however, must still pay high fees to Telefónica to interconnect with the incumbent's public network.⁶²⁰

Competition in the wireless telephony market might increase even further in the near future. Some industry analysts have speculated that the Spanish government will issue a third digital cellular license within two years, this one for a PCN network using the DCS-1800 standard.⁶²¹

614. *Spain gets phone message*, FIN. TIMES, Mar. 28, 1995, at 2.

615. *Id.*

616. TELEFÓNICA DE ESPAÑA, S.A., 1993 SEC FORM 20-F, at 9 (1994).

617. *EC and Spain discuss compensating Airtel for Pta85 billion licence fee*, FINTECH MOBILE COMM., June 29, 1995.

618. *Id.*

619. *Spain gets phone message*, *supra* note 614, at 2.

620. CRANSTON, *supra* note 303, at 142.

621. *Airtel's cheap price promise helps to secure Spanish GSM licence*, *supra* note 612.

Portugal

Portugal has a relatively small telecommunications market that has long been dominated by a collection of government-owned telecommunications operators. Since 1990, the government has introduced competition to discrete sectors of the telecommunications services markets, such as cellular telephony, but it is just now beginning to privatize the state-owned telecommunications operator and further liberalize the telecommunications services industry. Despite a recent push by the government to improve service and stimulate efficiency in preparation for more pervasive competition, telecommunications development in Portugal still ranks near the bottom of all EU member states.⁶²²

At the end of 1994, the Portuguese population totaled 9.8 million people.⁶²³ And even after a large increase in the penetration of telephone lines—from approximately 14 main lines per 100 inhabitants at the end of 1985 to 35 at the end of 1994—Portugal remains well below the average EU penetration rate of approximately 45 main lines per 100 inhabitants as of December 31, 1993.⁶²⁴ This relative underdevelopment suggests two things: stifled telecommunications development during an era of government-owned monopoly, and the resultant potential for significant growth following liberalization of the telecommunications markets and an infusion of investment capital.

Portugal has experienced growth in its telecommunications services industry in recent years, and certain indicators of Portugal's economy suggest that this telecommunications growth will continue. First, Portugal is rapidly undergoing a transformation from an agricultural economy to one character-

622. PORTUGAL TELECOM, S.A., PROSPECTUS FOR 6,500,000 ORDINARY SHARES 48 (June 1, 1995) [hereinafter PORTUGAL TELECOM PROSPECTUS].

623. MERRILL LYNCH, PORTUGAL TELECOM: INITIAL OPINION 1 (June 27, 1995) [hereinafter MERRILL LYNCH PORTUGAL TELECOM REPORT].

624. PORTUGAL TELECOM PROSPECTUS, *supra* note 622, at 42.

ized more by value-added manufacturing and services, which in turn demand greater and more reliable telecommunications services.⁶²⁵ Second, from 1985 to 1994, Portugal's real GDP growth averaged 3.2 percent per year, approximately 0.8 percent above the weighted average for EU countries during the same period.⁶²⁶ Analysts predict that Portugal's GDP growth rate will exceed 3 percent in both 1995 and 1996.⁶²⁷ And finally, in 1994, inflation was just 5.2 percent, the lowest in twenty years, and unemployment was 7.1 percent, well below the EU average of 11 percent.⁶²⁸ The combination of a healthy economy and a continued shift of national resources from agriculture to information services will likely generate an increased demand for telecommunications services.

Despite a global offering by the government of nearly one-third of the government-owned telecommunications monopoly, the full potential of Portugal's telecommunications industry will not be met without an even greater receptivity toward foreign capital and telecommunications expertise. Foreign investment, which in 1994 was thirty times greater than in 1985, has been one of the key forces behind Portugal's economic growth in recent years, and the degree to which foreign direct investment will be allowed in the Portuguese telecommunications market will be critical to meeting the increasing demand in Portugal for telecommunications services. The partial privatization of Portugal Telecom in June 1995 raised nearly \$1 billion of investment capital, but the government continues to exert significant influence over Portugal Telecom's operations and prohibits direct foreign participation (portfolio investment aside) in the provision of the nation's basic telecommunications services. Portugal, however, has insufficient domestic capital available to finance telecommuni-

625. *Id.* at 81.

626. *Id.* at 80.

627. Peter Wise, *Developing a safe haven in Portugal—The Emerging Investor*, FIN. TIMES, June 12, 1995, at 25.

628. PORTUGAL TELECOM PROSPECTUS, *supra* note 622, at 81.

cations infrastructure development. Portfolio investment in Portugal is minimal, and the largest industrial companies are state-owned.⁶²⁹

History. For many years, the Portuguese government owned and managed all of its telecommunications operators on a separate, non-coordinated basis. As part of its plan to consolidate its telecommunications holdings, the government in 1992 formed Comunicações Nacionais, S.G.P.S. (CN) as a holding company designed to manage the government's interests in telecommunications and postal companies; until June 1995, CN owned 100 percent of Portugal Telecom.⁶³⁰ The Portuguese government formed Portugal Telecom in June 1994, when it consolidated its three separate, wholly owned telecommunications operating companies: Telecom Portugal, Telefones de Lisboa e Porto, S.A. (TLP), and Teledifusora de Portugal, S.A. (TDP). Each company performed different functions, and each has a unique history.

Telecom Portugal was originally a company called Correios e Telecomunicações de Portugal, S.A. (CTT). CTT provided local and domestic long-distance telephony services to every part of Portugal, other than the country's two largest metropolitan areas, Lisbon and Oporto. CTT also provided international long-distance telephony services between all of Portugal (including Lisbon and Oporto) and the contiguous European countries, the former Soviet Union, Algeria, Tunisia, and Morocco. In December 1992, the Portuguese government formed Telecom Portugal to assume the assets and responsibilities of CTT.⁶³¹

TLP was created from a company called the Anglo Portuguese Telephone Company. Until 1967, the Anglo Portuguese Telephone Company provided local telephone services

629. Sharpe, *Repsol deal augurs well for Portugal Telecom*, *supra* note 542, at 28.

630. PORTUGAL TELECOM PROSPECTUS, *supra* note 622, at 3.

631. *Id.* at 42.

in the Lisbon and Oporto metropolitan areas. In 1967, the Portuguese government formed TLP to take over the provision of local telephone services in these cities.⁶³²

In 1991, the Portuguese government formed TDP to operate the infrastructure for the provision of television broadcasting services.⁶³³

In April 1995, the Portuguese government—in further consolidation of the government-owned telecommunications operators and in final preparation for the public offering of Portugal Telecom—transferred its 51.16 percent stake in Companhia Portuguesa de Rádio Marconi (Marconi) from CN to Portugal Telecom, establishing a unified full-service provider.⁶³⁴ Marconi has provided intercontinental telecommunications services in Portugal since 1926 and has been majority owned by the Portuguese government since 1982.⁶³⁵ Until the partial privatization of Portugal Telecom, public shareholders held the remaining interest in Marconi. As part of the offering, Portugal Telecom shares were exchanged for all outstanding Marconi shares.⁶³⁶

Portugal Telecom provides international services to European countries (including countries of the former Soviet Union) and to Algeria, Tunisia, and Morocco, while Marconi provides international services to all other destinations.⁶³⁷ Marconi provides substantially all international network infrastructure.⁶³⁸

632. *Id.*

633. *Id.*

634. *Portugal Telecom absorbs Marconi stake*, FIN. TIMES, Apr. 7, 1995, at 17.

635. PORTUGAL TELECOM PROSPECTUS, *supra* note 622, at 29.

636. MERRILL LYNCH PORTUGAL TELECOM REPORT, *supra* note 623, at 2.

637. PORTUGAL TELECOM PROSPECTUS, *supra* note 622, at 43.

638. *Id.*

Portugal Telecom owns 100 percent of TV Cabo, the cable television operator.⁶³⁹ Together, Portugal Telecom and Marconi own TMN, one of two Portuguese cellular providers.

Regulation. The overall legislative and regulatory framework that governs the Portuguese telecommunications industry consists of an overarching telecommunications statute, regulations enacted thereunder, and a quasi-independent regulatory body. Law N° 88/89 of 11th September (the "Basic Law") provides the basis for regulation of the telecommunications sector in Portugal. Decree Laws develop and give effect to the general provisions of the Basic Law. The Instituto das Comunicações de Portugal (ICP) acts under and enforces these laws. The ICP is accountable to the Ministry of Public Works, Transport and Communications (Ministry of Communications), the agency with ultimate authority over Portugal's telecommunications industry.⁶⁴⁰ Finally, the concessions and licenses under which the telecommunications companies operate also serve to regulate the industry.⁶⁴¹

Portugal Telecom operates under an exclusive thirty-year concession expiring in March 2025.⁶⁴² Under the concession, Portugal Telecom has the exclusive right to provide domestic and international public switched voice telephone services and telecommunications transmission infrastructure.⁶⁴³ The exclusivity of the concession will expire in 2003, if not sooner. Under an EC mandate, most European countries must open voice telephony and telecommunications infrastructure to full competition by January 1, 1998.⁶⁴⁴ The EC granted Portugal a five-year extension because its telecommunications

639. *Id.*

640. *Id.* at 3.

641. *Id.* at 65.

642. MERRILL LYNCH PORTUGAL TELECOM REPORT, *supra* note 623, at 2.

643. *Id.*

644. EC Directive 93/C213/01.

industry is less developed than the telecommunications industries of other European countries. Thus, Portugal has until January 1, 2003 to introduce full competition to its markets for basic telephony and telecommunications infrastructure.⁶⁴⁵

Nonetheless, the ICP has indicated that it will liberalize the Portuguese market for basic telecommunications services as soon as is practicable.⁶⁴⁶ Portugal Telecom anticipates that the Portuguese government will introduce competition to the public switched voice telephony market several years before 2003—perhaps as early as 1998 and probably by 2000.⁶⁴⁷ Portugal Telecom also holds licenses and authorizations to provide other telecommunications services in Portugal in competition with other providers, including mobile telephony, paging, and cable television services.⁶⁴⁸

Certain telecommunications services in Portugal, other than basic services and the provision of the underlying infrastructure, have already been opened to competition. Under Portuguese law, cable television and complementary networks and related services (which include mobile telephony, paging, and data communications services) are open to entry by other licensed operators. In other words, these markets have been opened to competition, but only to a limited extent.⁶⁴⁹ Value added and information services, defined as services that do not require their own infrastructure, are fully open to competition, subject only to a registration requirement with the ICP.⁶⁵⁰

The ICP issues licenses to provide data communications services under Decree Law 349/90 of 3rd November.⁶⁵¹

645. PORTUGAL TELECOM PROSPECTUS, *supra* note 622, at 72.

646. MERRILL LYNCH PORTUGAL TELECOM REPORT, *supra* note 623, at 2.

647. PORTUGAL TELECOM PROSPECTUS, *supra* note 622, at 2.

648. *Id.*

649. *Id.* at 63.

650. *Id.*

651. *Id.* at 72.

Portugal Telecom provides data transmission services, as do five other licensed operators, including companies associated with AT&T, BT, France Telecom, and SIBS, a provider of data communications services to Portuguese banks.⁶⁵²

The Initial Public Offering. On June 1, 1995, the Portuguese government sold 28.3 percent of Portugal Telecom through a global offering.⁶⁵³ The domestic offering was priced at Es2,800 per share.⁶⁵⁴ The offering price for the American depository receipts (ADRs) was set at \$18.72.⁶⁵⁵ Each ADR represents one ordinary share of Portugal Telecom.⁶⁵⁶ The entire global offering generated \$982 million.⁶⁵⁷ Shares offered to retail investors were more than four times oversubscribed.⁶⁵⁸ But despite pre-float expectations generated by the stock and the heavy trading volume following the offering, the price of Portugal Telecom shares continued to hover near its offering price.⁶⁵⁹ After a week of trading, the stock had gained only 2.1 percent, considerably short of the 10 percent appreciation that the global coordinators of the offering expected.⁶⁶⁰

The Portugal Telecom offering was important not only because it raised capital for telecommunications investment, but also because it enhanced the general viability of the Lisbon stock market and the likelihood of success of future

652. *Id.*

653. Peter Wise, *Portugal Telecom offering priced*, FIN. TIMES, June 2, 1995, at 25.

654. *Id.*

655. Amy Dunkin, *Getting a Line on Europe's Telecom Free-For-All*, BUS. WEEK, June 19, 1995, at 142.

656. *Portugal Telecom, S.A.*, S&P DAILY NEWS, July 7, 1995.

657. Conner Middelmann & Peter Wise, *Portugal Telecom success underlines positive mood—International offerings*, FIN. TIMES, June 5, 1995, at 21.

658. Andrew Griffiths, *Portugal Telecom rings the bells for privatisation*, DAILY TELEGRAPH, June 5, 1995, at 25.

659. Peter Wise, *Telecom issue breathes life into Lisbon*, FIN. TIMES, June 6, 1995, at 30.

660. Wise, *Developing a safe haven in Portugal*, *supra* note 627, at 25.